

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER  
AND  
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.551/Bang/2022
Assessment year : 2018-19

Mysore Mercantile Company Ltd., No.201 & 202, Shresta Bumi, No.87, K.R. Road, Basavangudi, Bangalore – 560 004. <b>PAN: AACCM 1216H</b>	Vs.	The Joint Commissioner of Income Tax, Circle 4(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Mr. Mohammed Mujassim, Advocate
Respondent by	:	Smt. Priyadarshini Baseganni, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.10.2022
Date of Pronouncement	:	17.10.2022

**ORDER**

*Per Padmavathy S., Accountant Member*

This appeal is against the order of the CIT(Appeals), National Faceless Assessment Centre, Delhi [NFAC] dated 09.05.22 for the assessment year 2018-19.

2. The assessee \ raised following grounds of appeal:

**“NO PENALTY CAN BE IMPOSED THERE IS REASONABLE  
CAUSE FOR NON-PAYMENT**

1. The Appellant submits that in the present case, admittedly the Appellate Authority has held that the Appellant has defaulted out of compulsion arisen from financial crunch. However the Appellate authority has erroneously levied 10% of the defaulted amount.
2. The Appellant submits that the Appellant has been complying with payment of taxes regularly which has been admitted by the Department and it is crystal clear that non-payment of tax is not an intentional one, but due to financial hardship.
3. The Appellant submits that the Appellate authority has failed to consider the proviso to Section 221 of the Income Tax which states that no penalty shall be levied if the default was for good and sufficient reasons. Hence the levy of penalty is liable to be set aside on this ground alone.
4. The Appellant submits that the Appellate Authority has no power to impose penalty once there are good and sufficient reasons and reasons has been assigned for levying penalty. Hence the penalty levied is liable to be set aside.

**BINDING PRECEDENTS NOT FOLLOWED**

5. The Appellant submits that the Appellate Authority has failed to consider the binding precedents. Hence the penalty levied is liable to be set aside on this ground alone

Each of the grounds is without prejudice to one another and the Appellant craves leave of this Hon'ble Tribunal to add, delete, amend or otherwise modify one or more of the grounds during the course of hearing.”

3. Brief facts of the case are that the assessee filed return of income for the AY 2018-19 on 30.11.2018 declaring a total income of NIL and total tax payable of Rs.1,36,39,215. Out of the above tax liability, assessee paid an amount of Rs.7,22,797 at the time of filing the return of income and balance amount of Rs.1,29,16,420 was shown as tax payable outstanding as per the return of income.

4. The JCIT, Circle 4(1)(2), Bangalore [AO] treated the assessee as assessee in default as per provisions of section 140A(3) of the Act and called on the assessee to file a response in this regard. The assessee submitted before the AO that assessee is in the business of doing turnkey construction contract for renewal energy projects and one of the major projects got delayed due to which the payment from the customer got delayed. Therefore the assessee is in serious financial hardship and therefore could not pay the entire tax at the time of filing the return of income. The AO did not accept the submissions of the assessee for the reason that the assessee had reported substantial revenue and profit during the year under consideration. The AO proceeded to pass an order u/s. 221(1) of the Act dated 20/02/2019 thereby levying a penalty of 100% of tax arrears. Aggrieved, the assessee filed an appeal before the CIT(A).

5. The assessee before the CIT(A) reiterated its submissions with regard to its financial trouble. The assessee also submitted that immediately after availability of funds, the arrears of tax was paid by the assessee as per below details:-

Sl. No.	Major Head	Minor Head	Tax	Total Tax	BSR Code	Date of Deposit	Challan Serial No.
1-	0020	300	5,759,312	5,759,312	6360218	22-02-2019	23324
2	0020	300	2,500,000	2,500,000	6360218	01-02-2019	24138
3	0020	300	2,500,000	2,500,000	6360218	31-01-2019	25506
4	0020	300	2,500,000	2,500,000	6360218	29-01-2019	24234

6. The CITA after considering the submissions of the assessee reduced the amount of penalty to 10% of the amount of default thereby giving a relief to the extent of Rs.1,16,24,778. The relevant extract of the order of the CITA is as given below:-

“4.2.1 I have carefully gone through the submission of the Appellant. I have also gone through the records and facts of the case. Appellant has submitted that it pays its tax dues regularly in time and has furnished last three years details about payment of taxes. From the table it is seen that assessee has paid taxes in time in past to prove its credentials that its not a habitual defaulter. This year it has faced financial crisis and defaulted out of compulsion arisen from financial crunch. Despite of facing financial difficulties it has paid all taxes due alongwith interest in the month of February 2019, subsequent to filing of return. However at the same time it can't be denied that it has defaulted in making payment of self assessment tax within time. The AO has levied penalty u/s 221(1) equivalent of tax default which appears to be harsh considering the financial hardship faced by the assessee. In the judicial pronouncements relied upon by appellant it has been held that penalty is not automatic and it has to be based on facts and reasonability of cause for default. In my humble opinion penalty is rather too harsh for default of few months, I feel that penalty may be levied at the rate of 10% of amount of default. Accordingly it is held that penalty is restricted to 10 % of default in taxes paid which comes to Rs 12,91,642/- and gets relief of Rs 1,16,24,778/-.”

7. Aggrieved, the assessee is in appeal before the Tribunal.

8. On merits the Id. AR submitted that the major reason for the non-payment of tax is the serious financial constraint for the assessee and the assessee upon receipt of funding paid the taxes which fact has been acknowledged by the CIT(A). The Id AR also submitted that the penalty u/s. 221(1) cannot be levied when the assessee has paid the self- assessment tax along with interest thereon. The Id AR submitted

that section 140A(3) as it stands for the year under consideration did not envisage levy of penalty for delay in deposit of self-assessment tax. The Id.AR in this regard relied on the decision of Mumbai bench of the ITAT in the case of *Heddle Knowledge Pvt. Ltd. v, ITO, ITA No.7509/MUM/2011 dated 19.1.2018* where the issue of levy of penalty u/s.221(1) r.w.s.140A(3) has been considered.

9. We heard the rival submissions and perused the materials on record. We notice that the CIT(A) has acknowledged the fact that the assessee could not pay the tax due to financial constraints and that once the funding is received the assessee has paid the taxes. Now coming to the issue of levy of penalty u/s.221(1) r.w.s.140A(3) we notice that the Mumbai Bench of the ITAT in the case of *Heddle Knowledge Pvt. Ltd* (supra) has held as under:-

“4. Sec 140A(3) of the Act as it stands for the year consideration reads as under

140A(3) If any assessee fails to pay the whole or any part of such tax (or interest or both) in accordance with the provisions of sub-section (1) he shall, without prejudice to any other consequences which he may incur be deemed to an assessee in default in respect of the tax (or interest or both) remaining unpaid and all the provisions of the Act shall apply accordingly”

5. Our attention has been drawn to the erstwhile Sec. 140A(3) of the Act which was operative upto 31.03.1989 and was amended by the Direct Tax Laws (Amendment) Act, 1987, and the erstwhile provision read as under :—

"(3) If any assessee fails to pay the tax or any part thereof in accordance with the provisions of sub-section (1), the Assessing Officer may direct that a sum equal to two per cent of such tax or part thereof, as the case may be, shall be recovered from him by way of penalty for every month during which the default continues;

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard."

Quite clearly, in terms of the provisions of Sec. 140A(3) of the Act as existing till 31.03.1989, the Assessing Officer was empowered to levy penalty in cases where assessee had failed to pay the self-assessment tax, and such penalty was leviable for every month during which the default continued of a sum equal to 2% of such tax or part thereof. At the time of introduction of the new section by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 01.14.1989, the Explanatory notes issued by CBDT vide Circular no. 549 of 31.10.1989 contained the following, which seeks to explain the import of the substitution of new section. The relevant paragraphs of the Circular dated 31.10.1989 (supra) are reproduced as under :—

"Para 4.17 : The old provisions of subsection (3) of the section provided for levy of penalty for non-payment of self-assessment tax, since the rate of mandatory interest for failure to pay the tax has now been increased, it is not necessary to retain this provision any more. The amending Act has accordingly omitted the said sub section (3).

4.18 : In order to vest the power of recovery of tax and interest due under this section on the basis of the return, amending Act 1987, has inserted a new sub section (3) in the section to provide that if any assessee has not paid self assessment tax and interest in full before filing the return, he shall be deemed to be an assessee in default in respect of such tax and interest."

Quite clearly, if one is to read the earlier Sec. 140A(3) of the Act and the amended section w.e.f. 1.4.1989 alongwith the explanatory notes to the amendment conjointly, it is clear that the earlier provision prescribing for levy of penalty for default outlined in Sub-section (1) of Sec. 140A(3) has yielded place to mandatory charging of interest for such default. The aforesaid legislative intent also gets strength by the fact that simultaneously the legislature prescribed for mandatory charging of interest u/s 234B of the Act for default in payment of self-assessment tax w.e.f. 01.04.1989 onwards.

6. However, a contrary position is taken by the Revenue to the effect that for having defaulted in payment of self-assessment tax within the stipulated period, assessee qualifies to be "an assessee in default" as prescribed in the amended Sec. 140A(3) of the Act and, therefore, if one is to read the same with Sec. 221(1) of the Act, the action of the Assessing Officer in imposing penalty is quite justified. In sum and

substance, it is sought to be emphasised on the strength of Sec. 221(1) of the Act that the penalty is leviable so long as the default is in the nature which renders the assessee as an "assessee in default" for payment of tax. Sec. 221(1) of the Act prescribes for penalty when assessee is in default in making the payment of tax. On the face of it, the argument of the Revenue appears to be justified, so however, the same does not merit acceptance if one examines the issue in slight detail. Notably, the penalty envisaged Sec. 140A(3) in the unamended provision was on the statute alongwith the penalty envisaged u/s 221 of the Act. Once Sec. 140A(3) of the Act has been amended w.e.f. 01.04.1989, as we have seen earlier, there is no amendment of Sec. 221 of the Act and it continues to remain the same. What we are trying to emphasise is if the plea of the Revenue is to be accepted, based on the amendment to Sec. 140A(3) of the Act, it would mean that prior to 01.04.1989 the same default invited penal provisions under two sections, namely, Sec. 140A(3) as well as Sec. 221(1) of the Act, which would appear to be peculiar and unintended. Furthermore, the intention of the legislature at the time of insertion of the amended Sec. 140A(3) makes it clear that the old provisions of Sec. 140A(3) prescribing for levy of penalty for non-payment of self-assessment tax was no longer found necessary because the said default would henceforth invite mandatory charging of interest. Ostensibly, the legislature did not envisage that consequent to the amendment, the default in payment of self- assessment tax would hitherto be covered by the scope of Sec. 221(1) of the Act. The emphasis of the Revenue is to point out that the non-payment of self-assessment tax renders the assessee "in default" in the amended provision which further prescribes that "all the provisions of this Act shall apply accordingly" and, therefore, the default is hitherto (from 01.04.1989) covered by Sec. 221(1) of the Act. In our view, the consequence of the aforesaid two expressions contained in Sec. 140A(3) are also not of the type sought to be understood by the Revenue, and rather the assessee is to be treated as an "assessee in default" for the limited purpose of enabling the Assessing Officer to make recovery of the amount of tax and interest due and not for levy of penalty, an aspect which has been specifically done away in the new provision. Therefore, considered in the aforesaid light, in our view, the fact that the amended Sec. 140A(3) w.e.f. 01.04.1989 does not envisage any penalty for non-payment of self-assessment tax, the Assessing Officer was not justified in levying the impugned penalty by making recourse to Sec. 221(1) of the Act. Before parting, we may again emphasise that Sec. 221 of the Act remains unchanged, both during the pre and post amended Sec. 140A(3) of the Act and even in the pre-

amended situation, penalty u/s 221 of the Act was not attracted for default in payment of self-assessment tax, which was expressly covered in pre 01.04.1989 prevailing Sec. 140A(3). Thus, without there being any requisite corresponding amendment to Sec. 221 of the Act in consonance with the amendments carried out in Sec. 140A(3) of the Act w.e.f. 01.04.1989, the Assessing Officer erred in levying the impugned penalty. Thus, on this aspect, we hereby set-aside the order of CIT(A) and direct the Assessing Officer to delete the penalty imposed u/s 140A(3) r.w.s. 221(1) of the Act”.

10. The facts of the assessee being similar we respectfully follow the above decision of the Hon’ble Tribunal and delete the penalty imposed u/s 140A(3) r.w.s. 221(1) of the Act by the AO. It is ordered accordingly.

11. In the result, the appeal is allowed in favour of the assessee

Pronounced in the open court on this 17<sup>th</sup> day of October, 2022.

Sd/-

( GEORGE GEORGE K. )  
JUDICIAL MEMBER

Sd/-

( PADMAVATHY S. )  
ACCOUNTANT MEMBER

Bangalore,

Dated, the 17<sup>th</sup> October, 2022.

*/Desai S Murthy /*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar  
ITAT, Bangalore.